SUPREME COURT, U.S.
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No. 90-1394

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

United Food and Commercial Workers International Union and Its Local 304A,
Petitioners,

v.

John Morrell & Co.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Morrell believes the questions presented are more properly phrased as set forth below.

The breach of contract action raises the following question:

1. Did the lower courts err in ruling (a) that the particular collective bargaining agreement in this case was ambiguous and (b) that the jury was permitted to decide, using extrinsic evidence, whether the parties intended the contract to bar sympathy strikes?

The action to overturn the arbitration award raises the following questions:

2. Did the lower courts err in ruling that, under the particular facts of this case, a labor arbitrator had exceeded the scope of his authority in concluding that the collective bargaining agreement permitted sympathy strikes where the courts found that both parties had expressly agreed not to submit the issue to the arbitrator?

3. Did the lower courts err in ruling that an arbitrator may not ignore the collateral estoppel effect of a prior liability judgment that is entered following a full trial on the merits and the denial of all post-trial motions simply because the judgment was not appealable until the separate issue of damages was decided? *(This question would be reached only if this Court were to grant certiorari on Question 2* ***and*** *rule that the lower courts had erred in finding that the arbitrator had exceeded the scope of his authority.)*

LIST OF PARTIES

John Morrell & Co. is a wholly-owned subsidiary of Chiquita Brands International, Inc., which in turn is approximately 53% owned by American Financial Corporation and certain of its wholly-owned subsidiaries. John Morrell & Co. has one subsidiary, Carmell Corporation.

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COUNTERSTATEMENT OF THE CASE

Following a ten-day trial, the jury below found that the unions had clearly and unmistakably waived the right to engage in sympathy strikes under the parties' collective bargaining agreement ("Agreement") and that, therefore, the three sympathy strikes at issue were a breach of the Agreement. Subsequently, in an arbitration over seniority rights of recalled strikers, an arbitrator *sua sponte* disregarded the jury's verdict, finding that the Agreement did not prohibit sympathy strikes. The Eighth Circuit affirmed both the jury verdict for Morrell and the district court's conclusion that the inconsistent arbitrator's award must be vacated. Those rulings were well-supported by the record:

The unions advised Morrell during contract negotiations in 1982 that the parties' no-strike clause barred all strikes. App. 16a. Subsequently, during the 1985 negotiations over the successor agreement, the unions tried to amend the no-strike clause to permit their members to honor picket lines set up by employees from other plants. *Id.* 16a-17a. Morrell repeatedly rejected that proposal because it would "essentially eviscerate" the contract's no-strike clause by permitting sympathy strikes. *Id.* The unions never disputed during negotiations Morrell's construction of the clause.

Instead of accepting a dilution of the no-strike clause in 1985, Morrell strengthened it by obtaining a "struck work" provision, which "expressly obligates the [Sioux Falls] workers to accept work transferred from another Morrell plant which is on strike." *Id.* 15a. The "struck work" clause reinforced the ban on sympathy strikes because "[t]hat protection would be rendered meaningless if Sioux Falls employees could avoid their contractual duty to accept work from striking plants by simply engaging in a sympathy strike." *Id.* Having abandoned their efforts to add language allowing sympathy strikes, and having agreed that they

would perform struck work, the unions signed the new Agreement in November 1985.

On August 4, 1986, employees from Morrell's Kansas plant set up a picket line at the company's Sioux Falls plant. Morrell reminded the unions that the Sioux Falls employees were required to cross the picket line. Nevertheless, they honored it. A similar incident occurred eleven days later.

Morrell sued for damages under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, in the federal court in Sioux Falls. Following an evidentiary hearing, the court enjoined further strikes under *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), finding that the second strike had been over an arbitrable dispute. App. 70a.

On appeal, the Eighth Circuit vacated the preliminary injunction. App. 60a. ("*Morrell I*") The court held that the strikes were sympathy strikes and therefore not enjoinable under *Buffalo Forge*, regardless of whether or not such strikes breached the contract. The court remanded the case for further proceedings on Morrell's claim that it was entitled to damages because the strikes violated the Agreement. App. 69a n.7.

In 1986, while the parties were litigating the legality of the injunction, the unions initiated, but ultimately refused to continue, an arbitration proceeding that directly raised the question of whether sympathy strikes were barred under the Agreement. In light of the unions' representations to the Eighth Circuit in *Morrell I* that they were prepared to arbitrate that issue, App. 66a, Morrell asked the unions to agree to proceed with the arbitration. The unions refused, forcing resolution of the scope of the no-strike clause to be resolved in Morrell's federal court case.

With the unions avoiding arbitration and the Eighth Circuit refusing to enjoin the strike, Morrell filed a petition for writ of certiorari asking this Court to overrule *Buffalo*

Forge so that employers could stop sympathy strikes in breach of collective bargaining agreements. The Court denied the petition. 481 U.S. 1014 (1987). Morrell was left with only one remedy—its Section 301 damages suit. Less than a month later, with Morrell powerless to prevent further sympathy strikes, the Sioux Falls employees struck again when pickets from another Morrell plant appeared at Sioux Falls. This strike lasted six months.

Liability on Morrell's Section 301 suit was tried in March 1988 in federal district court—the forum that the unions had chosen to have the legality of sympathy strikes decided. Under concededly proper instructions, the jury found that the unions had "clearly and unmistakably" waived the right to engage in sympathy strikes and had violated the Agreement by engaging in them. App. 10a n.8.

The district court denied the unions' post-trial motions on May 18, 1988. All that remained was to hold a separate trial on Morrell's damage claims.

On August 25, 1988, five months after the liability verdict and three months after the district court had denied the unions' post-trial motions, an arbitration took place in response to a new union grievance, which claimed that recalled strikers were entitled to their pre-strike positions. The stipulated submission to the arbitrator was as follows: "Do the seniority and discrimination provisions of the parties' collective bargaining agreement apply to the recall of those employees who were on a sympathy strike from May 1 to November 4, 1987?" App. 28a-29a. The submission said nothing about the legality of sympathy strikes or the scope of the no-strike clause. In fact, both lower courts found that the parties had expressly agreed that the submission *excluded* the question of whether sympathy strikes were permitted under the Agreement. *Id.*; App. 53a-54a.

The damages trial began on November 1, 1988. Morrell introduced expert testimony and other evidence showing that its damages were between $24.6 million and $34 million. The jury awarded Morrell $24.6 million, an amount the unions do not contest here.

In the middle of the damages trial, the arbitrator issued his award regarding the recall grievance. App. 83a. The arbitrator ruled, *sua sponte*—and contrary to the jury's verdict and three prior district court decisions denying summary judgment on the ground that the no-strike clause was ambiguous—that the Agreement unambiguously permitted sympathy strikes.

On Morrell's motion, the district court vacated the arbitration decision, finding that the arbitrator had engaged in "arbitration by ambush" by deciding an issue that the parties had expressly withheld from him. App. 54a. Alternatively, the court ruled that the arbitrator was bound by principles of issue preclusion to follow the prior federal court judgment against the unions on the same issue. App. 54a-56a.

The Eighth Circuit affirmed the district court judgments on both the breach of contract action and the suit to vacate the arbitrator's award. Following a lengthy analysis, the court concluded that "we have carefully considered all of the Unions' arguments, and we are convinced that they lack merit." App. 36a.

ARGUMENT

I. THE ISSUES UPON WHICH REVIEW IS SOUGHT CONCERNING THE SCOPE OF THE UNIONS' NO-STRIKE OBLIGATIONS ARE NOT WORTHY OF THIS COURT'S DISCRETIONARY JURISDICTION.

Based upon *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), and *Metropolitan Edison Co. v. NLRB*, 460 U.S.

693 (1983), all federal courts, including the Eighth Circuit below, apply three major principles in determining whether sympathy strikes are in breach of a particular collective bargaining agreement:

(1) Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1988), grants employees the right to engage in strikes, including sympathy strikes. App. 9a.

(2) The right to engage in a sympathy strike may be waived. *Id.*

(3) Any waiver of the right to engage in sympathy strikes must be clear and unmistakable. *Id.*

The unions identify no disagreement among the courts about these principles. Applying them, the Eighth Circuit agreed with the district court that whether the unions had waived the right to engage in sympathy strikes presented an issue of fact. The unions' first two issues ostensibly attack the standards applied by the Eighth Circuit in this regard. In reality, the Eighth Circuit applied settled principles to a unique no-strike clause in a unique collective bargaining agreement; the unions are simply asking this Court to review an outcome that they do not like. The outcome of the court's application of these settled rules presents no issue suitable for review.

A. The Lower Courts' Determination That The Parties' No-Strike Clause Is Ambiguous Is Not Appropriate For Review.

The unions' first issue concerning the scope of the no-strike clause is "[w]hether a limited no-strike clause—which does not prohibit all strikes but rather prohibits only strikes over specified contract disputes between the contracting parties—clearly and unmistakably waives" the right to engage in sympathy strikes. (Pet. i)

It is unclear what this issue asks the Court to decide. As presented, it appears to be a tautology. The unions seem to be asking this Court to decide whether an unambiguously limited no-strike clause, that clearly bars only certain strikes and is equally clear in its failure to bar others, may nevertheless be interpreted to bar strikes outside its clearly limited scope. It is so plainly uncontroversial that the answer to that question is "no" that it cannot be worthy of this Court's attention. Accordingly, the unions must be quarreling with the Eighth Circuit's conclusion that the particular no-strike clause here is ambiguous. That determination was based on the settled legal principles advanced by the unions themselves.

The Eighth Circuit started its analysis by ruling that "[e]xtrinsic evidence may not be considered 'for the purpose of showing that the parties intended to make an agreement which is inconsistent with the unambiguous words of their written contract.' " App. 8a (citation omitted). This was exactly the standard urged by the unions below. (Un. Cir. Br. 18) Because the Eighth Circuit properly stated the applicable law, which the unions themselves urged, this aspect of the court's analysis presents no issue for review.

Having agreed with the unions that extrinsic evidence cannot be used to contradict an unambiguous contract, the Eighth Circuit turned to deciding whether the parties' no-strike clause was unambiguously limited, as the unions claimed. The court phrased this inquiry as involving "whether the contractual language is reasonably susceptible of the meaning proposed by the party asserting the ambiguity." App. 9a, quoting *Realex Chem. Corp. v. S.C. Johnson & Son*, 849 F.2d 299, 302 (8th Cir. 1988). Once again, although the unions make veiled criticism of this standard here (Pet. 5, 11, 12, 21), they urged below exactly the same

test: "The relevant question is . . . 'whether the contract is reasonably susceptible to the meaning proposed by [the plaintiff].' " (Un. Cir. Reply Br. 2, quoting *Realex*)

In applying the unions' proposed standards to determine whether an ambiguity existed, the Eighth Circuit reviewed the Agreement and the circumstances surrounding its negotiation. App. 14a-15a. Yet again, the unions urged this precise approach below, stating that, "in determining whether the contract language is ambiguous," a court may review the contract language and " 'the circumstances prior to and contemporaneous with the making of the contract.' " (Un. Cir. Reply Br. 2-3, quoting Un. Cir. Br. 18-19) Counsel for the unions reaffirmed this position at oral argument in the Eighth Circuit.

Given their agreement with each of the Eighth Circuit's legal standards, the unions' only possible complaint regarding the court's ambiguity determination is with the result reached by applying the standards. Review of such a highly-particularized inquiry is not appropriate for this Court's consideration. The unions virtually concede as much. (Pet. 21)[1] In any event, the Eighth Circuit's conclusion was correct. (See pp. 13-14 *infra*)

In sum, the Eighth Circuit's conclusion that the parties' no-strike clause was ambiguous was based upon well-settled standards that were advanced by the unions themselves. The

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[1] While Morrell believes that the unions' first issue is directed at the Eighth Circuit's ambiguity determination, review must also be denied if the unions are attacking the jury's verdict. Morrell and the unions presented their evidence and made their arguments to the jury. The unions do not claim that the jury was improperly instructed. The Eighth Circuit carefully reviewed the evidence, and a writ of certiorari is not appropriate to conduct yet another review of that evidence, which was more than sufficient to sustain the verdict.

application of those standards presents no question suitable for review.

B. There Is No Conflict Among The Circuits Regarding The Admissibility Of Extrinsic Evidence Concerning The Parties' Intent Under An Ambiguous No-Strike Clause And, In Any Case, The Unions Waived The Issue Below.

While the unions' first question apparently takes issue with the Eighth Circuit's ambiguity determination, the second one assumes that the no-strike clause here was ambiguous and asks this Court to decide "[w]hether extrinsic evidence can properly be relied upon to transform an 'ambiguous' provision of a collective bargaining agreement into a 'clear and unmistakable' waiver" of the right to engage in sympathy strikes, "or whether, per contra, such a waiver must be clearly stated in the contract's text." (Pet. i)

The unions assert that this issue is appropriate for review because "the lower courts are in disagreement as to whether such a waiver must be stated in the contract's text . . . ." (Pet. 7) There is no such conflict. All courts agree that extrinsic evidence should be considered in determining the parties' intent concerning an ambiguous no-strike clause. No court has held that an ambiguity is fatal to a claim of waiver of the right to engage in sympathy strikes. No court requires an explicit waiver in the contract's text.

In any event, even if a conflict arguably exists, this Court should decline review because the unions created the conflict or, at the very least, acceded to it below.

1. All Courts Agree That Extrinsic Evidence May Be Considered In Construing An Ambiguous No-Strike Clause.

The sole authority for the asserted conflict is a 16-year-old Seventh Circuit case, *Gary Hobart Water Corp. v.*

NLRB, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975). Based upon this case, the unions assert that the Seventh Circuit "requires 'clear and unmistakable language' in the labor contract to effect a waiver . . . ." (Pet. 19) The unions claim that, by contrast, "under the approach of the Eighth Circuit panel majority here, wherever contractual language is 'ambiguous' the fact-finder is authorized to engage in an *entirely open-ended inquiry into extrinsic evidence of the parties' 'intent'* . . . ." (Pet. 19) (emphasis in original)

The Eighth Circuit's decision here creates no conflict with *Gary Hobart*. Moreover, the unions' myopic focus on *Gary Hobart* ignores three subsequent Seventh Circuit cases that have made clear that sympathy strikes need not be waived explicitly by the language of the no-strike provision and that extrinsic evidence may be considered in determining the scope of an ambiguous no-strike provision. All other decided cases—representing another six circuit courts of appeal—are in accord.

(a) There is no conflict between the Seventh and Eighth Circuits.

There is but one rule in the Seventh and Eighth Circuits, as in all federal courts: whether the right to engage in sympathy strikes has been waived depends upon the parties' intent. If the contract language does not clearly express that intent, extrinsic evidence is admissible to determine whether the parties intended a waiver. The different results below and in *Gary Hobart* are not because different legal standards are applied in different circuits; they are because the same standards were applied to different no-strike provisions in different contracts with different negotiating histories.

In analyzing the no-strike clause at issue here, the Eighth Circuit applied what the unions themselves termed "unusually well-marked" (Un. Cir. Br. 16) contract law standards,

particularized to meet the rigorous requirements for finding waiver of an NLRA-protected right. Thus, in determining the scope of a no-strike clause, the focus is whether the "Union intended to waive its right to engage in sympathy strikes." App. 8a-9a, quoting *Amcar Div., ACF Indus., Inc. v. NLRB*, 641 F.2d 561, 567 (8th Cir. 1981). To determine the parties' intent, "[w]e look to the language of the contract, the structure of the contract, the bargaining history, and any other relevant conduct of the parties that shows their understanding of the contract." *Id.* Where sympathy strikes are not barred by the express language of the no-strike clause itself, "an implied waiver must be established only by 'clear and unmistakable' evidence." *Id.*, quoting *Metropolitan Edison*, 460 U.S. at 708.

The Seventh Circuit's standards are in accord with the foregoing rules. The Seventh Circuit, like the Eighth Circuit, has made clear that the issue of waiver depends upon the parties' intent. *Gary Hobart* simply illustrates an application of this settled principle to a particular no-strike clause that the court found unambiguously expressed the parties' intent. The no-strike provision in *Gary Hobart*, unlike the provision at issue here, was contained within the contract's arbitration procedures. Moreover, also unlike the contract at issue here (see pp. 13-14 *infra*), the contract in *Gary Hobart* contained no other provisions indicating an intent to bar sympathy strikes. Given these facts, the Seventh Circuit concluded that the language of the contract "indicates an intention to treat the no-strike clause as having application coextensively with that of the arbitration clause." 511 F.2d at 288.

Having concluded that the contract language itself demonstrated an intent to permit sympathy strikes, the court believed that "bargaining history between the Company and Union need not be examined . . . ." *Id.* Nevertheless, the

court did review the negotiating history, concluding that "if we carry our consideration into that history, our conclusion is only reinforced." *Id.* The court did not rule that the no-strike clause must itself explicitly waive the right to engage in sympathy strikes. Nor did it rule that extrinsic evidence could not be considered in interpreting ambiguous no-strike provisions.

Four years after *Gary Hobart*, in *W-I Canteen Service, Inc. v. NLRB*, 606 F.2d 738 (7th Cir. 1979), the Seventh Circuit made clear that the determination of whether a particular no-strike provision bars sympathy strikes requires "a case-by-case analysis of the language of the bargaining agreements in issue and on their operation within the factual circumstances of the labor controversy at hand." *Id.* at 743. (citation omitted) The no-strike provision in *W-I Canteen*, like the provision in *Gary Hobart* and the one here, did not contain an explicit waiver of the right to engage in sympathy strikes. Like the no-strike clause in *Gary Hobart* and the one here, the *W-I Canteen* provision also referred to the contract's arbitration procedures. It stated in relevant part:

> [*T*]*here will be no strike* or lockout during the life of this Agreement *so long as the Company and the Union* abide by the terms of this Agreement or *submit to arbitration any differences which may arise which are not covered by this Agreement.*[2] *Id.* at 740.

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[2] The italicized language of the no-strike clause in *W-I Canteen* is similar to the one in the instant case and different from the one in *Gary Hobart*. In *W-I Canteen* the clause required arbitration of all disputes, including those that "are not covered by this Agreement." Similarly, Article II of the Morrell no-strike provision requires arbitration of "any disputes which may arise between [the] Company and the Union" (Art. II § 5), and affirms the need for a "means to facilitate peaceful adjustments of all

In deciding whether the *W-I Canteen* no-strike clause barred sympathy strikes, the court specifically rejected the claim "that the no-strike clause [must] contain the specific term 'sympathy strike' before finding a waiver." *Id.* at 745. In fact, after analyzing the no-strike clause, together with other provisions of the contract, the court was "satisfied that the language of the no-strike clause is sufficiently clear to preclude sympathy strikes," even though, as here, sympathy strikes were not explicitly prohibited and the no-strike clause referred to the arbitration procedures. *Id.* at 746. The court confirmed its conclusion by "turn[ing] to a discussion of the extrinsic evidence of intent in the record, most of which relates to bargaining history." *Id.* at 746. That negotiating history, like the evidence here, included the fact that the union had requested "a clause specifically reserving the right to honor picket lines at the employer's premises, which was rejected." *Id.*

In *United States Steel Co. v. NLRB*, 711 F.2d 772, 779 (7th Cir. 1983), the Seventh Circuit reaffirmed that "[t]he failure of the no-strike clause to refer expressly to sympathy strikes is not conclusive . . . ." Rather, as in *Gary Hobart* and *W-I Canteen*, the court reviewed the extrinsic evidence, finding that "the terms of the collective bargaining agreement and the background under which it was negotiated persuades us that there was a clear and unmistakable waiver of the employees' right to engage in a sympathy strike." *Id.* at 778. The court made clear that *Gary Hobart* was simply a particularized application of the principle that the parties' intent must be given controlling weight. Thus, "where an arbitration clause and an express no-strike clause are closely interwoven, it *may* be reasonable to infer that the parties intended the two provisions to have the same scope." *Id.* at

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grievances *or other disputes* that may arise between the Company and the Union . . . ." (Art. II § 3) (emphasis added)

777 (emphasis added). In all cases, however, "[t]he question is simply whether the parties intended to preclude sympathy as well as work-related strikes." *Id.* at 779. It had been reasonable to infer in *Gary Hobart* that the particular no-strike clause was limited because "not only was the contract lacking any acknowledgment of the industrial necessity to avoid work stoppages, but the no-strike clause and the grievance and arbitration procedures . . . were contained in the same clause and were directly intertwined." *Id.* at 779.

The factual considerations that harmonized *Gary Hobart*, *W-I Canteen* and *United States Steel* also demonstrate that this case is not in conflict with *Gary Hobart*. These same considerations also demonstrate that the Eighth Circuit was correct in concluding that the no-strike clause here is not unambiguously limited.

The Morrell no-strike clause—like the one in *United States Steel* and unlike the one in *Gary Hobart*—is part of a broader portion of the Agreement, Article II, which is captioned "Purpose of Agreement." Article II contains several provisions that confirm the parties' intent to bar sympathy strikes.

First, the no-strike clause itself, which is contained in Article II § 5, is comprehensive. It provides that there shall be no strikes. The unions repeatedly try to edit the provision to make it appear that the no-strike obligation is limited to arbitrable disputes (see, e.g., Pet. 5, 7, 9), although the clause does not say so. The unions' need to use ellipses and brackets to make clear their reading of the provision confirms, at the very least, that the clause is not unambiguous. *Second*, Article II § 3 provides that "*[i]t is the intent and purpose of the parties*" to "establish the means *to facilitate peaceful adjustments of all grievances or other disputes* . . . ." (emphasis added) The Eighth Circuit con-

cluded that this provision—which expressly extends beyond arbitrable grievances—supported the inference that "the parties wanted the no-strike provision to apply to sympathy strikes." App. 15a. *Third*, Article II § 6 contains the "struck work" provision, which the Eighth Circuit found would be "rendered meaningless if Sioux Falls employees could avoid their contractual duty to accept work from striking plants simply by engaging in a sympathy strike." *Id.*[3] *Fourth*, Article II, like the no-strike clause in *United States Steel* and unlike the one in *Gary Hobart*, is completely separate from the arbitration provisions, which are located in Article XXI, captioned "Grievance Procedure." Thus, as in *United States Steel*, "[t]he two clauses appear in separate sections of the collective bargaining agreement that carry unrelated topical headings," indicating that "the no-strike clause is functionally independent of the arbitration clause of the contract." 711 F.2d at 778.

The Eighth Circuit here and the Seventh Circuit in *United States Steel* viewed these different features of the collective bargaining agreements—which were entirely absent in *Gary Hobart*—as crucial in interpreting the unions' no-strike obligations. *Compare* App. 15a *with* 711 F.2d at 778. Put simply, *Gary Hobart* is distinguishable on its facts. The Eighth Circuit's conclusion that this case is factually

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[3] The unions' argument that the obligation to handle struck work and the asserted right to engage in sympathy strikes can be reconciled makes no sense. The refusal to handle struck work from another Morrell plant would itself be a strike, because the employees would be refusing to perform such work. Such a strike would be a sympathy strike because it would not arise out of any dispute with Morrell at the plant to which the product was shipped. By agreeing to handle struck work, the unions recognized that they could not strike, *i.e.*, refuse to do work, in sympathy with other striking plants.

closer to *United States Steel* than *Gary Hobart* was well-founded.

Finally, any doubt about whether the Seventh Circuit, like the Eighth Circuit, gives controlling weight to the parties' intent was resolved in *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524 (7th Cir. 1990). That case involved an appeal of an NLRB decision following remand from a prior appeal to the D.C. Circuit. In the initial appeal, the D.C. Circuit held that, in determining whether the parties intended to waive the right to engage in sympathy strikes:

> [T]he words parties use . . . are only evidence of their intent; the words are not themselves the parties' intent . . . . The intent of the parties to collective bargaining agreements is not to be discerned by reference to "abstract definitions unrelated to the context in which the parties bargained," *C&C Plywood*, 385 U.S. at 430, 87 S. Ct. at 565, especially where bargaining history is crucial to an understanding of that intent.

Local Union 1395, IBEW v. NLRB, 797 F.2d 1027, 1036 (D.C. Cir. 1986). The Seventh Circuit quoted this proposition with approval on the subsequent appeal, adding that these principles required a careful consideration of the "extrinsic evidence bearing on the parties' actual intent in analyzing waiver" of the right to engage in sympathy strikes. 898 F.2d at 529. The court did not rule, as the unions suggest, that extrinsic evidence is admissible only "where a no-strike clause is, on its face, 'all encompassing . . . .' " (Pet 11) That issue was not even before the court.

The Seventh Circuit's rule that the parties' intent is to be given controlling weight is exactly the rule that the Eighth Circuit applied here. The asserted conflict with the Seventh Circuit is chimerical.

(b) All other circuits are in accord with the Seventh and Eighth Circuits.

Every other court that has decided whether a no-strike provision bars sympathy strikes agrees with the foregoing principles. Because the unions base the asserted conflict solely upon *Gary Hobart*, they virtually ignore the other cases, arguing only in a footnote that there is "confusion and uncertainty in the lower courts regarding the proper approach to interpreting no-strike provisions." (Pet. 17 n.6) The cited evidence of this supposed confusion and uncertainty is that in some cases "no-strike clauses were held not to reach sympathy strikes" while others "reach the opposite result." (*Id.*)

There is no confusion among the courts. Different results are to be expected when courts are construing different no-strike provisions in different contracts with different negotiating histories. Far from being confused, the federal courts—representing six circuits in addition to the Seventh and Eighth—have uniformly given the parties' actual intent controlling weight, viewing extrinsic evidence as a crucial, and often dispositive, factor.[4] No court has held that the no-

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[4] *See, e.g., NLRB v. C.K. Smith & Co.*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978) (although no-strike clause referred to arbitration procedures, court consulted bargaining history to determine whether sympathy strikes were barred); *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326*, 624 F.2d 1182, 1190-91 (3d Cir. 1980) ("[*a*]*bsent evidence to the contrary, . . .* where the contract read as a whole indicates that the no-strike clause is tied to issues covered by the contract," sympathy strikes are not barred; "[h]ere none of the evidence satisfies the quantum of proof necessary to overcome this result") (emphasis added); *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 457 (3d Cir. 1981) (agreement as a whole and extrinsic evidence supported conclusion that parties intended to waive right to engage in sympathy strikes; *Delaware Coca-Cola*

strike clause must expressly preclude sympathy strikes. No court has refused to consider extrinsic evidence bearing upon the parties' intent. No court has perceived any conflict on these matters.

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Sometimes the parties' intent is clearly stated by the words of the contract. Sometimes the parties' intent, although itself clear, has been imperfectly expressed by the contract, and the language is ambiguous. In such cases, no

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distinguished because there "we were unable to find any extrinsic evidence indicating that the parties had intended the no-strike clause to be broader than the arbitration clause"); *IBEW Local 803 v. NLRB*, 826 F.2d 1283, 1294 (3d Cir. 1987) (different results in *Pacemaker Yacht* and *Delaware Coca-Cola* turned on availability of extrinsic evidence in the former but not the latter; regarded "extrinsic evidence as an integral part of [the] determination of the parties' intent on the issue of waiver"); *Ryder Truck Lines, Inc. v. Teamsters Freight Local Union*, 727 F.2d 594, 599 (6th Cir.), *cert. denied*, 469 U.S. 825 (1984) (no-strike provision and other portions of contract demonstrated "that the parties intended to prohibit" sympathy strikes "regardless of whether the underlying dispute is arbitrable"); *NLRB v. Southern Cal. Edison*, 646 F.2d 1352, 1364-65 (9th Cir. 1981) ("[w]aiver may be found in unequivocal extrinsic evidence bearing on ambiguous contract language"; moreover, "contract need not explicitly prohibit sympathy strikes to show intent to waive the right to engage in such activity"); *NLRB v. Gould, Inc.*, 638 F.2d 159, 164 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981) ("no evidence was presented to suggest the parties intended . . . a prohibition" of sympathy strikes; case "distinguishable from cases where extrinsic evidence was offered to prove that the no-strike clause was intended to prohibit sympathy strikes"); *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986) (parties' intent must be given " 'controlling weight' . . . whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence").

authority supports taking from a jury its role of determining the parties' intent. As long as the evidence supports a finding of clear and unmistakable waiver, the jury's verdict cannot be disturbed. Having been instructed on this high standard of proof, the jury here concluded that the unions had breached their no-strike obligation to Morrell. The unions cannot convert the Eighth Circuit's affirmance of this verdict into a conflict among the circuits.

2. Even If A Conflict Arguably Exists, The Unions Waived The Issue Below.

Even if the purported conflict alleged by the unions exists, it is not reviewable because the unions conceded below the propriety of the supposedly inconsistent Eighth Circuit standards. They admitted that (i) extrinsic evidence could be considered to interpret ambiguous no-strike provisions and (ii) the language of the no-strike clause need not itself explicitly preclude sympathy strikes.

The unions began the legal discussion in their Eighth Circuit brief by stating that "the proper analytic approach to the question presented here is unusually well-marked by the basic principles of contract law . . . ." (Un. Cir. Br. 16) One of those "basic principles" was that "[w]here a contract 'is deemed ambiguous' the court may weigh extrinsic evidence to aid in its construction." (*Id.* at 18)(citation omitted) In their reply brief, the unions underscored that "[t]he major premise of our opening brief is that a district court is to submit a contract interpretation question to a jury *if and only if* that court has first determined that the contract provision at issue is ambiguous." (Un. Cir. Reply Br. 1)(emphasis in original) At oral argument, the unions again agreed that extrinsic evidence may be considered in interpreting an ambiguous no-strike clause.

Similarly, and contrary to their claim here that waiver of the right to sympathy strike must be "clearly stated in the contract's text" (Pet. i), the unions stated below that "[w]here there is not an express waiver" of the right to engage in sympathy strikes, the right may nevertheless be waived, although "the evidence of waiver must be 'clear and unmistakable.' " (Un. Cir. Br. 21, quoting *Amcar*, 641 F.2d at 566) It was *exactly* this standard that the Eighth Circuit applied below in ruling that the right to engage in sympathy strikes "may be waived expressly or impliedly; however, an implied waiver must be established only by 'clear and unmistakable' evidence." App. 9a, quoting *Metropolitan Edison*, 460 U.S. at 708.[5]

In sum, if the purported conflict with the Seventh Circuit exists—which it does not—it is only because the unions created it by advocating below the very standards the Eighth Circuit adopted. Having successfully urged those standards below, the unions cannot dispute them here or assert that the Eighth Circuit's adoption of them created a conflict between the circuits that this Court must resolve.

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[5] Contrary to their suggestion here that *Metropolitan Edison* requires that the no-strike clause itself must contain an express waiver of the right to engage in sympathy strikes (Pet. 19), the unions advised the Eighth Circuit below that the above-quoted portion of its prior decision in *Amcar*—which permits an implied waiver if the evidence of waiver is clear and unmistakable—"correctly anticipated the Supreme Court's holding in *Metropolitan Edison*." (Un. Cir. Br. 21)

II. THE ISSUES RAISED BY THE OVERTURNING OF THE ARBITRATION AWARD DO NOT MERIT A GRANT OF CERTIORARI.

A. The Eighth Circuit Applied Settled Legal Principles In Deciding That The Arbitrator Had Exceeded The Parties' Submission.

"After reviewing the record, the arbitration clause, and the issues submitted for arbitration," the Eighth Circuit affirmed the district court's decision vacating the arbitrator's award because, by *sua sponte* deciding the meaning of the no-strike clause, "the arbitrator was not 'even arguably . . . acting within the scope of his authority.'" App. 28a, 31a, quoting *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 38 (1987).

The unions seek review of this determination on the ground that the Eighth Circuit's ruling "stands in direct conflict with the Sixth and Tenth Circuits' understanding of the governing rule" and "gravely threatens the federal policy favoring the arbitration to labor disputes." (Pet. 25, 26) Neither claim is correct. The unions' true complaint is, once again, not with legal principles but with the Eighth Circuit's fact-bound application of settled law to this case.

The Eighth Circuit recognized that an arbitrator's construction of a collective bargaining agreement is entitled to great deference, but that an award must nevertheless be vacated where the arbitrator "has not stayed within the areas marked out for his consideration," including where the arbitrator "went beyond the submission." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). See App. 28a. This proposition flows inexorably from the doctrine that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S.

574, 582 (1960). This principle is judicially enforced by the rule that "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). The Eighth Circuit explicitly applied these standards in holding that "where 'a court concludes that the arbitrator did not stay within the bounds of his authority, this principle of deference inevitably gives way . . . to the greater principle that an award not drawing its essence from the agreement is not entitled to judicial enforcement.' " App. 27a. (citation omitted)

Contrary to the unions' claims, there is no split in the circuits concerning the scope of the proper inquiry. Courts must review the arbitrator's authority as delineated by the terms of the collective bargaining agreement, the scope of the issue submitted, the statements made by the arbitrator and the parties during the proceedings, and other conduct of the parties. App. 28a-31a. The two cases the unions cite from the Sixth and Tenth Circuits in support of the claimed conflict adhere to the same rule. *See UFCW v. Safeway Stores, Inc.*, 889 F.2d 940, 946 (10th Cir. 1989) ("[t]he scope of the issues submitted to the arbitrator also controls the arbitrator's authority"; " 'courts must look both to the contract and to the submission to determine his authority' "); *Johnston Boiler Co. v. Local Lodge No. 893*, 753 F.2d 40, 43 (6th Cir. 1985) ("an award that clearly goes beyond the grievance submitted to the arbitrator is [not] enforceable"; parties can "limit the arbitrator's authority by careful drafting of the submission").[6]

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[6] *See also Synergy Gas Co. v. Sasso*, 853 F.2d 59, 63-64 (2d Cir.), *cert. denied*, 488 U.S. 994 (1988); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1294 (9th Cir. 1987); *International Chem. Workers Union v. Mobay Chem. Corp.*, 755 F.2d 1107, 1110 (4th Cir. 1985); *Mobil Oil Corp. v. Independent*

Nor are the circuits split over the standard of review to be used in conducting this inquiry. To alleviate any concern (quoted out of context by the unions (Pet. 26-27)) that courts would be required to "determine, case by case, the exact scope of submission in the endless number of grievances and disputes that inevitably occur between employers and employees," *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299, 302 (3d Cir. 1982), courts accord deference to an arbitrator's interpretation of the issue submitted. *Id.* This precise approach was adopted by the Eighth Circuit in *Lackawana Leather Co. v. UFCW*, 706 F.2d 228, 230-31 (8th Cir. 1983)(*en banc*), and followed by the Eighth Circuit in the case below. App. 27a (following *Lackawana Leather* and recognizing that " 'an arbitrator's interpretation of the scope of the issue submitted to him is entitled to the same deference accorded his interpretation of the collective bargaining agreement' ")(citation omitted). In their briefs below, the unions repeatedly cited *Lackawana Leather* as stating the correct rule and successfully urged the Eighth Circuit to follow it in this case. (*See, e.g.*, Un. Cir. Reply Br. 28)

Given the nature of the required inquiry, it is not surprising that, while the usual rule of deference generally results in courts sustaining awards, the application of these principles to particular cases has yielded varying results. Thus, despite the fact that the Eighth Circuit in this case overturned the arbitrator's award for exceeding the boundaries of the parties' submission, the Eighth Circuit has more frequently affirmed arbitration awards and rejected arguments

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Oil Workers Union, 679 F.2d 299, 302 (3d Cir. 1982); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Union*, 611 F.2d 580, 583-34 (5th Cir. 1980); *Textile Workers Union v. American Thread Co.*, 291 F.2d 894, 896-97 (4th Cir. 1961).

that the arbitrator had overstepped his bounds. *See, e.g., Lackawana Leather*, 706 F.2d at 231-32; *United Elec. Radio & Mach. Workers v. Litton Microwave Cooking Products, Litton Sys., Inc.*, 728 F.2d 970, 972 (8th Cir. 1984) (*en banc*). The same variance occurs in other circuits, including the Tenth and Sixth Circuits, whose views the unions ask this Court to follow. Both circuits have vacated arbitration awards where appropriate.[7]

The unions also appear to argue that the Eighth Circuit improperly looked only to Morrell's intent concerning the scope of the submission and disregarded both the unions' intent and the arbitrator's understanding of the submission. (Pet. 24) While review of the Eighth Circuit's inquiry is too particularized to merit this Court's review, the unions' claims are meritless. The court's decision was based on an examination of the entire record concerning the understanding of all relevant persons—Morrell, the unions and the arbitrator—concerning the submission. As the Eighth Circuit explained:

> ***[T]he parties indicated*** at [the initial arbitration hearing] that they did not want the arbitrator to address the issue of the legality of sympathy strikes. ***Each party insisted*** that it would prevail in arbitration of the recall issue regardless of the outcome of the appeal of the liability verdict. . . . ***The parties*** discussed providing the

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[7] *See, e.g., Retail Store Employees Union, Local 782 v. Sav-On Groceries*, 508 F.2d 500, 502-03 (10th Cir. 1975) (overturning an arbitration award where the arbitrator decided a back-pay issue that had not been submitted to him); *Local 791, Int'l Union of Elec. Radio & Mach. Workers v. Magnavox Co.*, 286 F.2d 465, 466 (6th Cir. 1960) (overturning an award, where "[u]pon a review of the record, we are of the opinion that . . . the arbitrator went beyond the grievance submitted to him for arbitration and beyond the provisions of the collective bargaining contract").

> arbitrator with their briefing of the sympathy strike issue; the evidence suggests, however, that ***the parties intended*** such information to be used only as background material for the recall issue.

App. 28a (emphasis added). The court went on to explain that, in their opening arbitration briefs, "***neither party*** referred to the issue of the legality of the strikes" and that the ***arbitrator's*** "characterization of the issue contains no suggestion that the issue previously decided by the jury, the meaning of the no-strike clause, was submitted for arbitration. Moreover, ***neither party*** offered any evidence on the issue . . . ." App. 28a, 29a. (emphasis added) The Eighth Circuit referred to Morrell's intent only to reject the unions' claim that Morrell's framing of the issue showed that Morrell intended to arbitrate the meaning of the no-strike clause. *Id.*[8]

B. There Is No Conflict Among The Circuits Regarding The Applicability Of Collateral Estoppel To Bar Arbitrators From Disregarding Prior Judicial Decisions.

The unions also attack the Eighth Circuit's ruling that the arbitrator was bound to give collateral estoppel effect to the prior jury verdict concerning the no-strike clause. This case

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[8] The unions' mischaracterization of the basis for the Eighth Circuit's decision in this regard led them to argue here that "under the Eighth Circuit's rule either party . . . may, with impunity, trump the arbitration provision . . . by unilaterally withholding its consent to the arbitration of a *particular issue* . . . ." (Pet. 27) (emphasis in original) This alleged concern is obviously not a problem because any improper "withholding [of] consent to the arbitration" is readily and easily addressed by asking a court to compel arbitration. *See Piggly Wiggly*, 611 F.2d at 583-84.

presents a poor vehicle for reviewing this question. The Eighth Circuit's holding was an alternative ground for the decision below and would be reached only if the Court were to (i) grant certiorari on the unions' third issue and (ii) reverse the Eighth Circuit's determination that the arbitrator exceeded the scope of his authority. Such an alternative ground is not an appropriate candidate for review.

Only a few cases have considered whether collateral estoppel bars arbitrators from reconsidering judicial decisions.[9] Each has held that collateral estoppel principles did govern. The unions cannot cite a single contrary case. Instead, they argue that the Eighth Circuit's alternative holding "merits plenary review by this Court," because *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), "considered an analogous issue." (Pet. 27)

W. R. Grace did not involve an analogous issue. It involved the distinctly different question of the precedential impact of an arbitral decision on a second arbitrator. The case had nothing to do with, and the Court did not even refer to, *res judicata* or collateral estoppel. The question was what level of deference should be accorded a second arbitrator's determination that the collective bargaining agreement did not require him to follow the first arbitrator's

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[9] *See, e.g., Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 498-99 (5th Cir. 1986); *Telephone Workers Union, Local 827 v. New Jersey Bell Tel. Co.*, 584 F.2d 31, *33-34 (3d Cir. 1978); Burmah Oil Tankers, Ltd. v. Trisun Tankers, Ltd.*, 687 F. Supp. 897, 899 (S.D.N.Y. 1988); *Hudson-Berlind Corp. v. Local 807, Int'l Bhd. of Teamsters*, 597 F. Supp. 1282, 1285-86 (E.D.N.Y. 1984); *Pitta v. Hotel Ass'n of New York City, Inc.*, 643 F. Supp. 247, 252 (S.D.N.Y.), *vacated on other grounds*, 806 F.2d 419 (2d Cir. 1986).

reasoning.[10] The crucial differences between the preclusive effect of a judicial decision and that of an arbitral proceeding have been explained by this Court in two recent cases—*McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

McDonald held that an arbitration award is not given preclusive effect in a Section 1983 action because it is not a "judicial proceeding," and because "an arbitration proceeding cannot provide an adequate substitute for a judicial trial" under Section 1983 and the federal rights that statute is designed to protect. 466 U.S. at 288, 292. One year later, in *Dean Witter*, this Court held that federal courts hearing federal securities law cases need not stay related arbitration proceedings for fear of the potential collateral estoppel impact of an arbitration award on the federal case. The Court held that an arbitration ruling may not have any preclusive effect on federal litigation. 470 U.S. at 222.

These cases are grounded on the fundamental differences between the functions of courts and arbitrators. First, "because an arbitrator's authority derives solely from the contract," *McDonald*, 466 U.S. at 290, an arbitrator's focus is to interpret collective bargaining agreements—not to construe the law. Second, "arbitral factfinding is generally not equivalent to judicial factfinding"—with its less complete

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[10] The second arbitrator in *W. R. Grace* refused to abide by the first arbitrator's reasoning exonerating the company for laying-off another employee. He based his conclusion solely on the contract, explaining that the "collective bargaining agreement limited the arbitrator's authority . . . to considering whether the express terms of the contract had been violated," whereas the first arbitrator "had considered the fairness of enforcing the terms of the contract" and thus "had acted outside his contractually-defined jurisdiction." 461 U.S. at 763.

record of the proceedings, no rules of evidence, and limited or no discovery, compulsory process, cross-examination and testimony under oath. *McDonald*, 466 U.S. at 291. Thus, an arbiter's determination about what the parties agreed to in their contract cannot have the same impact as a judicial decision.

Finally, it would be highly ironic and fundamentally unfair if the unions were to be permitted to have the arbitrator disregard the jury's verdict and consider anew the very issue the unions forced the courts—instead of an arbitrator—to decide. When the no-strike controversy arose, the unions filed a grievance concerning their asserted right to engage in sympathy strikes. The unions then refused Morrell's request to go forward with arbitration, successfully resisted a motion to compel arbitration, and thereby forced years of federal court litigation that eventually resulted in a verdict against them. After losing in the forum they chose, the unions should not now be able to trump the judicial process, escape the adverse verdict, and prevail based on a subsequent award by an arbitrator who decided an issue that the parties agreed not to submit.

C. Certiorari Review of the Eighth Circuit's Specific Application Of Collateral Estoppel Principles To The Facts Of This Case Is Not Warranted.

The unions also seek review of the Eighth Circuit's specific application of collateral estoppel principles. Recognizing that, almost by its very nature, this fact-bound determination is not worthy of certiorari, the unions attempt to create the facade of a split in the circuits and an inherent conflict between the jury's verdict and the Eighth Circuit's earlier decision in *Morrell I*. Both efforts are futile.

The long-standing distinction between "finality" for collateral estoppel purposes and "finality" for appeal purposes has been widely recognized since Judge Friendly's decision

in *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962). The *Lummus* rule has been adopted by other lower courts, as well as the Restatement (Second) of Judgments § 13, which this Court quoted favorably in *Arizona v. California*, 460 U.S. 605, 618 n.7 (1983), in stating that "[a] judgment may be final in a *res judicata* sense as to a part of an action although the litigation continues as to the rest." The Restatement and the few courts that have addressed whether a liability judgment, even though not appealable, is entitled to collateral estoppel effect have uniformly held that it is.[11]

The unions argue that "[o]ther circuits" disagree with *Lummus*, citing *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269. (5th Cir. 1986) (Pet. 30) To the contrary, the Fifth Circuit in *Avondale* was careful not to disagree with *Lummus*, explaining that its decision was limited to partial summary judgment orders, which, by their very nature, are subject to continuing change, modification or reversal. *Id.* at 1270. *Avondale* explained that its decision was not inconsistent with *Lummus*, and the court expressly left open "whether the *Lummus* doctrine is the law of this Circuit," *Id.* at 1271 & n.7. Moreover, *Avondale* did not involve the situation presented here, *i.e.*, the preclusive effect of a jury verdict following a two-week trial on the merits that has been sustained over motions for judgment notwithstanding the verdict. In the final analysis, no case supports the unions' claim that the non-appealability of a liability judgment prevents that judgment from being given preclusive effect.

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[11] Restatement (Second) Judgments § 13, comment g, illustration 3 (1982); *Aiello v. City of Wilmington*, 470 F. Supp. 414, 418-19 (D. Del. 1979), *aff'd*, 623 F.2d 845 (3d Cir. 1980); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 440 F. Supp. 394, 399-403 (D. Nev. 1977).

Finally, in a last effort to cast doubt on the collateral estoppel decision, the unions resort to mischaracterizing the Eighth Circuit's holding in *Morrell I* as being inconsistent with the jury's verdict. (Pet. 29-30) The Eighth Circuit properly rejected this argument, explaining that *Morrell I* "was not called upon to decide whether the collective bargaining agreement barred sympathy strikes," because the only issue on that appeal "was whether the Unions had engaged in a sympathy strike . . . ." App. 7a. *Morrell I* itself made this clear, expressly leaving "[t]he merits of Morrell's request for damages" to be decided as a separate matter by the district court. App. 69a n.7.

The unions have been unable to convince anybody of their claim that *Morrell I* and this case are inconsistent—not Judge Bowman, who was on the *Morrell I* panel and also joined in the majority decision below, not Judge McMillan, who dissented below but made no reference to any inconsistency with *Morrell I*, and not Judges Lay or Fagg, both of whom were on the *Morrell I* panel and neither of whom voted to accept the unions' petition for rehearing *en banc*. In any event, the place to correct any conflict between *Morrell I* and this case was in the Eighth Circuit, which saw no conflict—not on certiorari review here.

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Both lower courts correctly decided to vacate the arbitrator's award because the arbitrator decided an issue that was expressly withheld from his consideration, and because he then violated principles of issue preclusion in deciding that issue. The courts applied settled legal principles about which the circuits are in agreement. There is no reason for this Court to conduct yet another review.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

DATE: April 8, 1991

Respectfully submitted,

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